United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-6171

DOCKET NO.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

To be argued by
SAMUEL GURSKY

NAPOLEON RICHARDSON and FRANCISCO CHAIMOWICZ, as Executors of the Estate of CONCEPCION BRODERMANN STUETZEL, also known as CONCEPCION BRODERMANN,

Plaintiffs-Appellants

v.

WILLIAM E. SIMON, as Secretary of the Treasury of the United States,

Defendant-Appellee

and the BANK OF NOVA SCOTIA,

Defendant.

PLAINTIFFS-APPELLANTS REPLY BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

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MU2-5527

TABLE OF CASES

OTHER AUTHORITIES

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NAPOLEON RICHARDSON and FRANCISCO CHAIMOWICZ, as Executors of the Estate of CONCEPCION BRODERMANN STUETZEL, also known as CONCEPCION BRODERMANN, Plaintiffs - against - WILLIAM E. SIMON, as Secretary of the Treasury of the United States, and the BANK OF NOVA SCOTIA, Defendants	File No. 76C-537

REPLY TO STATEMENTS OF APPELLEE
UNDER ITS "STATEMENT OF FACTS"

The footnote on Page 2 of the appellee's brief states: "Defendant Simon did not admit these facts for purposes of plaintiffs' motion for summary judgment. See Statement pursuant to Rule 9 (g) of the Local Rules, Appendix p. 25".

The government did not serve or file any answer to the complaint. It moved to dismiss "on the grounds the complaint fails to state a claim upon which relief can be granted." (Appendix p. 10). No affidavit in support of this motion could be or was submitted. However, neither was any affidavit in opposition to the plaintiffs' motion for summary judgment or any other evidence submitted to cast any doubt on the truth of plaintiffs' allegations in the complaint or affidavit in support of plaintiffs' motion for summary judgment. On oral argument, the United States Attorney admitted that only a question of law

was involved and that there were no factual issues to be determined.

The statements made by the appellee under Rule 9 (g) are in its entirety mere conclusions and without any factual evidence and were submitted about 40 days after oral argument.

Footnote #2 on page 3 of appellee's brief states:

"This license and the policy behind it are not in issue here. The license was issued under a policy of unblocking assets of resident Cuban refugees which they owned prior to July 8, 1963, the date on which Cuban assets in this country were frozen. There was a presumption of an individed half interest in the assets in favor of Mrs. Stuetzel on the basis of the Cuban community property law. See 31 CFR 515.525 (a)."

The license under which 50% was released to the widow (Appendix p. 6) actually gives no reason for such release except that it points out that the account was in both names.

Verbatim copies of sections 515.505, 515.507, and 515.525 follow:

§ 515.505 Certain persons in the United States unblocked.

(a) Except as provided in paragraph (b) of this section the following are hereby licensed as unblocked nationals:

(1) Any individual resident in and within the United States except an individual who on or after the "effective date" has acted or purported to act directly or indirectly for the benefit of or on behalf of a designated country.

(2) Any partnership, association, corporation, or other organization which is a national of a designated foreign country solely by reason of the interest of persons licensed by this section.

(b) This section does not license as an unblocked national any person who is a specially designated national.

§ 515.507 Individuals who are citizens of, and residing only in the United States, unblocked.

(a) Any individual who is a citizen of the United States, residing only in the United States, and who is a national of a designated foreign country solely by reason of having been formerly domiciled or resident therein is hereby licensed as an unblocked national.

(b) This section does not license as an unblocked national any individual citizen of the United States who is a national of a designated foreign country by reason of any fact other than his former domicile or residence in such country.

§ 515.525 Certain transfers by operation of law.

(a) The following are hereby authorized:

(1) Any transfer of any dower, curtesy, community property, or other interest of any nature whatsoever, provided that such transfer arises solely as a consequence of the existence or change of marital status;

(2) Any transfer to any person by intestate succession;

(3) Any transfer to any person as administrator, executor, or other fiduciary by reason of any testamentary disposition; and

(4) Any transfer to any person as administrator, executor, or fiduciary by reason of judicial appointment or approval in connection with any testamentary disposition or intestate succession.

(b) Except to the limited extent authorized by § 515.523 or by any other license or authorization contained in or issued pursuant to this part no transfer to any person by intestate succession and no transfer to any person as administrator, executor, or other fiduciary by reason of any testamentary disposition, and no transfer to any person as administrator, executor, or fiduciary by reason of judicial appointment or approval in connection with any testamentary disposition or intestate succession shall be deemed to terminate the interest of the decedent in the property transferred if the decedent was a designated national.

Under 515.505 if the husband were alive and could come to the United States with his wife, they would be entitled to all of the funds and securities. Why, then, is it not logical that the heir-at-law who is a citizen of the United States be entitled to these funds.

REPLY TO POINT I OF APPELLEE'S BRIEF

The plaintiffs do not admit that the Cuban Assets Control Regulations prohibit any transfer of Carl Stuetzel's assets in this country. What we do admit is that while Carl Stuetzel was alive and lived in Cuba, he could not transfer any of his property in this country after the effective date of the

freeze order, July 8, 1963. Had he come to the United States at any time subsequent to July 8, 1963 as a permanent resident, he would have had his share of these funds unblocked and released to him under sections 515.505 and 515.525 of the regulations.

The plaintiffs do not find the trading with the Enemy Act unconstitutional. We contend that the application of the act by the Foreign Assets Control Director of the Secretary of the Treasury is unconstitutional.

Under the Cuban law and New York law Carl Stuetzel's widow became the owner of the entire fund on deposit with the Bank of Nova Scotia. On her arrival in the United States as a permanent resident, she became entitled to all of the funds and securities on deposit with the Bank of Nova Scotia as the survivor of the joint account. Her heir-at-law as well as her executors are and were American citizens residing in this country. None of them is a foreign national and the Cuban government has made no claim on these funds.

Section 675 of the New York State Banking law provides:

§ 675. **Joint deposits and shares; ownership and payment**

(a) When a deposit of cash, securities, or other property has been made or shall hereafter be made in or with any banking organization or foreign banking corporation transacting business in this state, or shares shall have been already issued or shall be hereafter issued, in any savings and loan association or credit union transacting business in this state, in the name of such depositor or shareholder and another person and in form to be paid or delivered to either, or the survivor of them, such deposit or shares and any additions thereto made, by either of such persons, after the making thereof, shall become the property of such persons as joint tenants and the same, together with all additions and accruals thereon, shall be held for the exclusive use of the persons so named, and may be paid or delivered to either during the lifetime of both or to the survivor after the death of one of them, and such payment or delivery and the receipt or acquittance of the one to whom such payment or delivery is made, shall be a valid and sufficient release and discharge to the banking organization or foreign banking corporation for all payments or deliveries made on account of such deposit or shares prior to the receipt by the banking organization or foreign banking corporation of notice in writing signed by any one of such joint tenants, not to pay or deliver such deposit or shares and the additions and accruals thereon in accordance with the terms thereof, and after receipt of any such notice, the banking organization or foreign banking corporation may require the receipt or acquittance of both such joint tenants for any further payments or delivery.

(b) The making of such deposit or the issuance of such shares in such form shall, in the absence of fraud or undue influence, be prima facie evidence, in any action or proceeding to which the banking organization, foreign banking corporation, surviving depositor or shareholder is a party, of the intention of both depositors or shareholders to create a joint tenancy and to vest title to such deposit or shares, and additions and accruals thereon, in such survivor. The burden of proof in refuting such prima facie evidence is upon the party or parties challenging the title of the survivor.

The joint account in the names of Mr. and Mrs. Stuetzel has not been challenged. As the survivor she is entitled to all of the funds.

The Secretary of the Treasury argues that an interpretation which results in the release of some portion of funds which were originally blocked would defeat the purposes of retaining "blocked funds for possible use or vesting to the United

States" or "for negotiation purposes in discussions with the Cuban government". (Page 8 appellee's brief).

Some of the regulations of the Foreign Assets Control themselves provide for unblocking - 515.505, 515.507, 515.525. See also footnote #2 of page 3 of appellee's brief.

The government cites Propper v. Clark 337 U.S. 472 (1949) which is not in point. That case involved a question of title to Austrian corporate property. The Court held that under New York law title did not pass to the Receiver before the freezing order and thus was subject to vesting under the Act.

Judge Platt in this case erred in stating that the plaintiffs herein argued that the Trading with the Enemy Act and the regulations were unconstitutional. The plaintiffs did not so argue. We contend that the application of the Act and some of its own regulations by the Treasury Department with respect to these plaintiffs was unconstitutional.

The Trading with the Enemy Act gives the President or any agency he designates the power or privilege with respect to transactions involving any property in which any foreign country and national thereof has any interest. (emphasis supplied).

Congressional intent has been construed by the Secretary of the Treasury to be - when blocked assets can no longer be available to the Cuban government or to the residents thereof, they should be unblocked. Sections 515.505, 515.507, 515.525.

The government as a matter of policy has unblocked funds when the applicant, a former Cuban resident, became a

permanent resident of the United States and it was shown that he did not act on behalf of Cuba.

No contention is advanced by the Treasury Department that the plaintiffs intend to use the blocked account for or on behalf of the Cuban government.

The Court of Appeals discussing congressional intent said in the Real case: "In 1965, Congress was urged to pass legislation requiring the unblocking of Cuban assets which were in fact totally or substantially owned by Americans. The pressure for such legislation came in large part from Americans with interests in Cuban corporations who were unable to secure corporate assets held by these corporations in the United States. In addressing this appeal, which is essentially the same as appellants' claim, the Senate Foreign Relations Committee stated as follows:

> ..... (T)he Committee on Foreign Relations recommends that upon application the Department of the Treasury examine with particular care each case involving Cuban assets beneficially owned by American citizens to determine whether those assets should continue to be blocked. In the committee's view, if the assets are wholly or substantially owned by citizens and residents of United States they should be unblocked, since it is possible that such assets may be placed in a fund at some future date and used to pay the claims of American citizens against the Cuban Government. This would be tantamount to using the property of one U. S. citizen

to pay the claim of another U. S. citizen. (Emphasis added.)

S.Rep.No.701, 89th Cong., 1st Sess. (1965), U.S.Code Cong. and Admin.News, pp. 3581, 3585. See also the House Report on the subject of unblocking the Cuban assets of American residents.

> While the committee does not recommend wholesale unblocking of all U. S. owned assets, it does recommend that a thorough examination be made by the Department of the Treasury on a case-by-case basis to determine from the evidence and equities involved in each case the proper disposition of U. S. national owned blocked assets and that, where proper, it unblock U. S. privately owned assets.

H.R.Rep.No.706, 89th Cong., 1st Sess. 7 (1965). Thus, it appears there is no intent on the part of Congress to require the Treasury to continue blocking funds lawfully claimed by American citizens where there is no Cuban interest in the assets."

With no live person living in Cuba who can be a "designated national" in this instance, the government picked on a dead person. However, the Cuban and New York law says that upon his death, the property he jointly had with his wife in the hands of the Bank of Nova Scotia became entirely hers.

Refusing the use of this money and property without any reasonable basis in logic or law is a violation of the Fifth Amendment to the United States constitution.

CONCLUSION

For the reasons urged in their main brief and amplified here, plaintiffs contend that the order of the District Court should be reversed and the Secretary of the Treasury directed to release the funds of the plaintiffs in possession of the Bank of Nova Scotia.

Respectfully submitted,

Samuel Gursky
Attorney for Plaintiffs-Appellants

State of New York)
County of New York) SS:

Samuel Gursky, being duly sworn deposes and says: I am not a party to this action. I am over 21 years of age. I reside in the Borough of Manhattan, City of New York.

That on the 10th day of February, 1977 I served the within reply brief upon David G. Trager, Esq., the attorney for the defendant-appellee in this action, at 225 Cadman Plaza East, Brooklyn, N.Y. 11201 the address designated by said attorney for that purpose by depositing 2 copies enclosed in a postpaid properly addressed wrapper in a post office, official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me the
10th day of February, 1977

Samuel Gursky

HYMAN ROTHBART
NOTARY PUBLIC, State of New York
No. 03-3374800 Qual. In Bronx Co.
Commission Expires March 30, 1977